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In the Supreme Court of the United States

OCTOBER TERM 1946

No. 909

WALTER E. MEYER, Intervener,
Petitioner,

vs.

BERRYMAN HENWOOD, as Trustee of ST. LOUIS SOUTHWESTERN RAILWAY COMPANY LINES, et al.,
Respondents.

Brief by Southern Pacific Company, One of the Respondents, in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The opinion of the Circuit Court of Appeals below is reported at 157 F.(2d) 337 (R. 5559-5680). The District Court's opinion is reported at 53 F. Supp. 914 (R. 5183-5212). The Interstate Commerce Commission's report and order (R. 3495-3735) are reported at 249 I.C.C. 5, and the Commission's supplemental report and order (R. 3736-3820) are reported at 252 I.C.C. 325.

STATUTE INVOLVED

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) are set forth in the Appendix hereto.

STATEMENT

A. RESPONDENT'S POSITION ON THE QUESTIONS PRESENTED

Petitioner Meyer, a stockholder in St. Louis Southwestern Railway Company (hereinafter referred to as Debtor), has presented as the fifth question in his petition (p. 18), "In view of the great improvement in net assets, reduction in principal indebtedness and accrued interest, improvement in net current assets and in earnings since the supplemental report of the Commission, is a new plan of reorganization necessary?" Southern Pacific Company (hereinafter referred to as Respondent), owner of approximately 87% of the stock of the Debtor, does not object to the granting of the writ, limited to the consideration of this question. It has heretofore filed in this Court its petition for a writ of certiorari to the Court below, which has been docketed at this term as No. 879, under the title *Southern Pacific Company, a Railroad Corporation, Intervener, Petitioner, vs. Berryman Henwood, as Trustee of St. Louis Southwestern Railway Company Lines, et al. Respondents,* and the Debtor has likewise filed its petition for a writ of certiorari, Docket No. 936. In both of these petitions it is urged that the Circuit Court has erred in failing to set aside the Interstate Commerce Commission's plan of reorganization for Debtor as inequitable because

of its failure to award any recognition to stockholders in view of Debtor's greatly improved asset position and earnings since the Commission's decision. The Petitioner's fifth question raises the same general question which is fully dealt with in the petitions and briefs of Respondent and the Debtor.

Questions 1 to 4, stated on pages 16 to 18 of Meyer's petition, go to quite different matters arising from charges repeatedly made by Meyer before the Commission and the lower Courts: (A) that the Commission's valuation of Debtor's properties was unduly low when made because failing to recognize that Debtor's past earnings, on which it was based, had been impaired by acts of many parties, including Respondent, who had successively controlled Debtor, allegedly in breach of fiduciary and contractual obligations and in violation of the antitrust laws; and (B) that a creditor claim of Respondent against Debtor, accorded recognition in the reorganization plan, should be expunged, or at least subordinated to the interest of the minority stockholders, because of Respondent's allegedly wrongful acts in its relations with Debtor, both before and after it acquired control. Briefly, these questions concern, respectively:

1. Claim that a successor judge in the District Court could not consider testimony taken at a hearing held before a judge who had died, with respect to the Commission's plan, even though opportunity was given to intervener Meyer to supplement or add to such testimony, of which opportunity he did not take advantage.

2. Claim that the Court should have considered independently of the findings and conclusion of the

Commission, Meyer's charges, which had been rejected by the Commission, that various railroads, including Respondent, had committed wrongful acts toward the Debtor.

3. Claim that the Commission and the District Court erred in alleged failure to exercise investigatory powers vested in them to examine into the wrongful acts alleged by Meyer to have occurred.

4. Claim that, after the case was in the Circuit Court of Appeals, a motion by Meyer to stay the appeals or remand the case to the District Court on account of newly discovered evidence should have been granted.[1]

Respondent opposes the granting of a writ of certiorari which would bring to this Court for consideration the questions just stated, because, first, the decision of the Court below was clearly correct upon each of the questions; secondly, none of the questions presents matters of general consequence and they are not of a character which customarily prompts this Court to grant certiorari; and, thirdly, the bringing of these questions to this Court for review would call for an appraisal of the merits of Meyer's oft-rejected contentions spread over thousands of pages of record and already dealt with in voluminous opinions of the Commission and the Courts below. The proliferation through this proceeding of Meyer's charges against all and sundry has tended to obscure the real strength of the case, which the Debtor and Respondent

1. This summary statement of the questions is sufficient to indicate what they concern. They will be taken up and stated more fully hereafter in the argument upon each question.

advance with confidence, that changed circumstances now warrant the sending of the plan back so that recognition may be given to the interests of the stockholders, including Respondent, Meyer and others.

B. THE FACTS

A background of facts must be sketched for an understanding of the matters sought to be brought before the Court by petitioner Meyer. Meyer's statement (pages 1 to 15 of his petition) does not suffice, because it sets forth, as facts, claims uniformly rejected by all who have considered them. It is possible that Meyer is merely stating his charges on page 2 when he refers to the record of earnings of the Debtor as impaired by illegal control by successor railroads—the opposite having been found by the Commission (R. 3604, 3637 and generally 3593-3637)—and to Respondent's wrongful and unlawful acts—the opposite having been found by the Commission (R. 3637, 3669 and generally 3624-3671). However, he later affirms as facts, time and again, matters which are untrue and proved to be untrue; e.g., the assertions in the first two full paragraphs on page 8 that Respondent did not solicit traffic for Debtor in accordance with a traffic agreement known as the Turney-Saunders agreement,[2] whereas the opposite had been found by the Commission (R. 3657, 3669, 3670), which finding was approved by the District Court (R. 5202) and by the Circuit Court (R. 5588). We shall outline the case as we see it, giving only uncontested facts

2. This was a traffic agreement between Respondent and Debtor entered into in November, 1932, under which Respondent agreed, with important exceptions, to solicit traffic preferentially for Debtor (R. 3652).

or, where so indicated, contested facts as found by the Commission or the Courts.

Prior to October 25, 1929, Respondent, its subsidiary, Texas and New Orleans Railroad Company, and Debtor were connecting railroad lines, but Respondent was not a stockholder or creditor of Debtor. Soliciting agreements existed, and joint traffic was built up of great value to both Respondent and Debtor (R. 3627). On October 25, 1929, Respondent began to purchase stock of the Debtor on the market (R. 3586). Between October 25, 1929, and July 1930, Respondent acquired on the market 42,600 shares of Debtor's common stock and by private purchase 87,200 shares of preferred stock (R. 3586). These purchases did not give control of the Debtor, but, on July 15, 1930, an agreement was entered into between Respondent and Kuhn, Loeb & Company under which Respondent, subject to approval by the Interstate Commerce Commission, had the right to acquire 24,700 additional shares of Debtor's common stock and 59,380 additional shares of preferred stock, which would give it numerical control. The Commission, after extended hearings, authorized acquisition and control of the Debtor and the purchase of the stock by Respondent by order becoming effective April 14, 1932 (R. 3588; *St. Louis S.W. Ry. Co. Control,* 180 I.C.C. 175). Thereupon, Respondent acquired the stock which had been the subject of the agreement and made an offer to minority stockholders as prescribed by the Interstate Commerce Commission (R. 3591).

After Respondent had taken control, it, as the Commission has found, permitted Debtor to operate as an independent carrier with a competent, independent and loyal

management (R. 3669, 3670). In November, 1932, a new traffic agreement was executed between Respondent and Debtor, called the Turney-Saunders agreement, which was helpful and to the benefit of the Debtor, as the Commission has found (R. 3670). The Commission considered at great length the management provided by Respondent for the Debtor and summarized its conclusion (R. 3669, 3670) as follows:

> "The general contention that the Southern Pacific failed to exercise control over the debtor in the debtor's interest and to exercise its competitive power in the debtor's behalf is not sustained, for the reason that the Southern Pacific appears to have exercised its control over the debtor in the debtor's interest, to the full extent required, by the election of directors who provided the debtor with a competent and independent management loyal to the debtor's interest, and to have exercised its competitive power in the debtor's behalf to the full extent required, through the making and carrying out of the Turney-Saunders agreement."

The Debtor in June, 1932, was confronted with a maturity of $20,727,750 of its consolidated mortgage 4% bonds (R. 3642-3643). In order to finance this maturity the Debtor was required to borrow $17,000,000 from the Reconstruction Finance Corporation. As a condition for its approval of the loan, the Commission required the guaranty of collection thereof by Respondent. *St. Louis Southwestern Ry. Co. Reconstruction Loan,* 184 I.C.C. 74, 83 Respondent did give this guaranty, and the 1932 maturity was met successfully (R. 3644). On July 13, 1936, Respondent paid the Reconstruction Finance Company the full

amount of the indebtedness guaranteed and received an assignment of the note (R. 3990). It was by reason of this transaction, entered into for the benefit of the Debtor that Respondent became a creditor of the Debtor. It is this indebtedness, incurred to save the Debtor from financial difficulty in 1932 and given recognition in the Commission's reorganization plan that Meyer urges should be expunged, or at least subordinated to his earlier stock investment in the Debtor (page 17, his petition, and page 26, his brief).

Shortly after the purchase of the stock of the Debtor by Respondent, the depression of the '30s ensued. How severe its effects were upon business, and especially upon railroads, is known to all. The railroad industry serving the Southwest was hit especially hard. The Missouri Pacific Railroad Company, the St. Louis-San Francisco Railway Company and the Chicago, Rock Island and Pacific Railway Company filed petitions in reorganization in the fore-part of 1933. On July 31, 1941, railways owning 31.04% of the entire railroad mileage in the country were in receiverships or trusteeships (Fifty-fourth Annual Report [1940] of Interstate Commerce Commission, p. 27). The Debtor resorted to reorganization proceedings on December 12, 1935. At that time it had experienced deficits, in net income, after charges, for six consecutive years, including 1935. These deficits were: For 1930, $445,481.36; for 1931, $291,916.98; for 1932, $3,471,325.05; for 1933, $1,536,894.32; for 1934, $1,145,436.53, and for 1935, $455,-195.05 (R. 101). Important obligations could not be renewed, as found by the Commission (R. 3561). By order dated January 3, 1936, the District Court below appointed

Berryman Henwood, of St. Louis, as trustee of the Railway Company and specified subsidiaries (R. 93-96), and since that date Henwood has been in complete charge of the properties of the Debtor. Respondent has been without power, and has not attempted, to influence the operation of the Debtor's railroad by the trustee under the direction of the District Court below. It has endeavored to the best of its ability to carry out the Turney-Saunders agreement and to support the Debtor in respect of traffic (R. 3670, 5202).

Due in part to the war, but in part also to efficient management and to the assistance which the Debtor has received from Respondent in respect of traffic, the Debtor has outstripped other railroads (see Meyer's brief, pp. 52, 53) and, in our opinion, has been restored to solvency.

A brief review of the proceedings in the reorganization is also required for an understanding of the questions presented in Meyer's petition. As stated above, the Debtor's petition for reorganization under Section 77 of the Bankruptcy Act was filed on December 12, 1935. The filing of the petition was approved by the Honorable Charles B. Davis in the District Court below, over the opposition of Meyer (R. 87-91).

The Court, in accordance with Title 11 U.S.C. Sec. 205 (c)(7), directing that the judge shall promptly determine and fix the time within which claims may be filed and the manner in which they may be evidenced and allowed, by its Order No. 28, dated February 5, 1936 (R. 3953-3955) and by its Order No. 81, dated May 22, 1936 (R. 3955-3961) fixed times and procedures in respect to the filing of claims. By its Order No. 184, dated April 13, 1937 (R.

3961-3962) it provided an extended time for filing of protests and objections to allowances of any claims which had been filed. By its Order No. 272, dated February 25, 1938 (R. 3962-3965) it referred the determination of claims to Honorable Marion C. Early, Special Master. Pursuant to these orders, the Reconstruction Finance Corporation, on March 18, 1936, filed its claim in respect to the indebtedness of the Debtor on account of the note held by it (R. 3965). The Reconstruction Finance Corporation assigned the note and claim to Respondent, which assignment was filed with the Court on July 21, 1936 (R. 3975-3981). Within the time allowed therefor, two corporations filed protests to the assigned claim held by Respondent (R. 3982-3984). After extended hearings, the Master filed with the Court, on August 25, 1939, his findings of fact and conclusions of law (R. 3985-3995). He found, among other things, that Respondent "did not overreach, coerce or take any advantage of Debtor, St. Louis Southwestern Railway Company, by reason of the fact that it owned approximately 87 per cent of its capital stock" (R. 3991-3992), and recommended the claim be allowed (R. 3994). The protesting corporations took exceptions to the report of the Special Master, objecting to his allowance of and refusal to subordinate the Respondent's claim (R. 3996), but the Court, on January 26, 1940, held that the report of the Special Master should be sustained, the protest disallowed, and the claim of Respondent allowed (R. 4002-4003). No appeal was taken in this decision. Meyer filed no protest to Respondent's claim on the note and took no part in the proceedings thereon.

On December 7, 1936, within the time allowed therefor, Debtor filed a plan of reorganization with the Commis-

sion, and other plans were filed by other parties (R. 3496). Hearings upon the plan of reorganization were held on March 16, 1937, were recessed, and were concluded on April 24, 1937 (R. 3497). At these hearings, Petitioner Meyer presented numerous charges that Respondent and those previously in control of Debtor had impaired its earnings by various alleged breaches of fiduciary obligations, contracts and the antitrust laws. These were summarized and disallowed in the proposed report of Examiner J. V. Walsh, filed February 7, 1938 (R. 255, 306-314). The case was argued before the full Commission upon exceptions to the proposed report on May 16, 1938 (R. 3496). A petition was filed in April, 1937, by Petitioner Meyer for an investigation by the Commission and for such other relief as might seem meet in respect of his charges against Respondent and others (R. 339-351). This was amplified by a supplemental petition filed June 21, 1937 (R. 357-467), in which the prayer requested, in addition to an investigation, an opportunity for the Petitioner to introduce evidence at reopened hearings. These petitions were denied by order of July 12, 1937 (R. 479-480), but the Commission on January 25, 1939, entered a further order reciting that it had under further consideration these petitions, and directing that the proceedings should be reopened "with respect to the matters alleged in said petitions, in so far as they may be relevant and material in this proceeding" (R. 501). Hearings pursuant to this order were held from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 3549). At these hearings, Meyer presented his case relative to his charges against Respondent and others, and his adversaries presented tes-

timony on their part. The hearings were conducted by Commissioner Clyde B. Aitchison and Examiner Walsh. On June 30, 1941, the Commission issued its report in which it generally and specifically found against each contention of Petitioner Meyer (R. 3547-3678). A petition for modification was filed by Meyer, along with petitions by others for modification of various phases of the report, and the Commission on March 9, 1942, issued its supplemental report maintaining and elaborating upon its findings against Meyer's contentions (R. 3742-3752).

The Commission in painstaking fashion made specific findings on all Meyer's particular charges and also made the following ultimate findings:

> "Meyer's general contention, that during the period beginning in March 1925 and continuing until April 15, 1932, the debtor's traffic was unfavorably affected and its earnings greatly impaired by wrongful and unlawful acts of the Southern Pacific, is not sustained by the record." (R. 3637)
>
> "From the evidence presented we find no basis for a conclusion that the Southern Pacific exercised control of the debtor prior to our authorization; or exercised such control in an improper manner after such authorization." (R. 3646)
>
> "The general contention that the Southern Pacific failed to exercise control over the debtor in the debtor's interest and to exercise its competitive power in the debtor's behalf is not sustained, for the reason that the Southern Pacific appears to have exercised its control over the debtor in the debtor's interest, to the full extent required, by the election of directors who provided the debtor with a competent and independent management loyal to the debtor's interest, and to have exercised its competitive power in the

debtor's behalf to the full extent required, through the making and carrying out of the Turney-Saunders agreement." (R. 3669, 3670)

"We are of the view that Meyer has had a full and fair opportunity to obtain and present evidence in support of his charges, and that such charges have been sufficiently investigated. The request for a reopening of the proceeding is denied." (R. 3675)

"We are of the view that the investigations already made are sufficient, and that further investigation of any of the matters brought to attention by Meyer in this proceeding would serve no useful purpose. His request for further investigation is denied." (R. 3676)

"Meyer argues that because of the facts of record, already discussed, the Southern Pacific's interest as a creditor and stockholder of the debtor should be subordinated to the interest of all other creditors and all other security holders of the debtor; and that title to causes of action which he alleges the debtor has against the Kansas City Southern, Kuhn, Loeb & Company, Southern Pacific Company, and others, arising out of the alleged conspiracy by which the debtor was, as alleged, illegally controlled for many years, should be reserved and vested in a trustee for the purpose of bringing suit. He also argues that title to causes of action which the debtor has, as alleged, against the Southern Pacific Company, the Union Pacific, Kuhn, Loeb & Company, and others, arising out of the failure, as alleged, of the Southern Pacific to exert its competitive power for the debtor, should also be reserved and similarly vested in a trustee for the purpose of bringing suit, as well as all other causes of action which the debtor may have against corporations and individuals legally liable for damage to the debtor. It is sufficient to say here that we have not found the existence of any con-

spiracy, or damaging bad faith or fraud on the part of the Southern Pacific and the other parties named, and there appears to us to be no cause of action as to which we should make the desired reservation in our reorganization plan." (R. 3678)

"As to erroneous evaluation of the evidence, he points to the division of views among members of this Commission. But there was no division of views on the question whether his representations had been fully and fairly considered, or on the question whether more protracted investigations were advisable. He also urges that if there is any residuum of doubt in our minds, or only a suspicion that the debtor has a cause of action against the Southern Pacific, that cause of action should be reserved in a trustee for the purpose of bringing suit, because after reorganization the Southern Pacific will have so close to a majority of the voting stock. It is sufficient in our view that the weight of the evidence does not justify the reservation of such a trust." (R. 3746)

On March 23, 1942, the Commission, in accordance with the provisions of 11 U.S.C. Sec. 205(e), certified the plan of reorganization, as modified by its supplemental report, to the District Court (R. 3494). Meyer, among others, filed objections in the Court to the plan (R. 3840). These objections reiterated his charges that the valuation was unduly low because based on past earnings allegedly depressed by illegal acts of those successively in control of Debtor and requested, among other things, that the interest of Respondent as a creditor and stockholder because of its illegal acts be expunged, or at least subordinated to all other creditors and stockholders of Debtor (R. 3842). A hearing was held before Judge Davis upon the plan of

reorganization and the objections thereto, at which considerable testimony was introduced, principally by Meyer (R. 4051). The Court issued an order confining testimony to matters occurring subsequent to the consideration of the plan by the Commission (R. 4186). The hearing was concluded on November 5, 1942 (R. 4993) with provision for additional arguments to be made at a later date by Meyer and the Debtor. Before arguments had been made and briefs filed, Judge Davis died. Judge Moore called the parties for a conference on April 23, 1943, to ascertain their views as to further procedure (R. 5137). After the conference the Court entered an order (R. 5181-5183) taking the case as submitted on the record as made before the Commission and on the testimony as taken before Judge Davis, with provision for oral argument on May 31, 1943, and for briefs. There was a further provision in the order that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182). In accordance with this order, all of the parties so desiring argued the case before Judge Moore and filed briefs. Petitioner Meyer argued orally and filed briefs with Judge Moore but filed no motion for the taking of additional testimony or otherwise as to the completion of the record. On February 9, 1944, Judge Moore rendered his opinion and order approving the plan of reorganization and overruling all of the objections thereto, including those of Petitioner Meyer (R. 5183-5213).

With respect to Meyer's charges the District Court said (R. 5199, 5202, 5203):

> "Meyer asks that the creditor's claim of the Southern Pacific Company be expunged, or at least subordi-

nated to those of all other claimants. This action, if it were justified, might well result in allowing some equity for the present stockholders. However, at the time this Court ordered the filing of claims, opportunity was given to other parties to object thereto and Meyer did not avail himself of that opportunity. The group referred to above as the foreign bondholders did object to the allowances of Southern Pacific's claim and extended hearings on the objections were held before a special master. The report of the master, finding in favor of the claimant and against the objectors, is recorded in the permanent record of these proceedings, Vol. X, pp. 5109-5123. Exceptions were taken to the Master's report, the objections were overruled and the claim allowed. While it does not appear that the issues raised by the objections are coextensive with those raised by Meyer in his objections to the plan, he was a party in the reorganization proceedings and had the opportunity to object at that time. In view of this, together with other opportunities to have his day in court which Meyer has taken advantage of and which will be discussed infra, we think the matter is no longer open to question." (R. 5199)

"We believe that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of his various allegations and objections, and that the time elapsed during the pendency of these proceedings has afforded ample time for him to fully prepare his case. He has not convinced either this Court or the Commission that his charges are well-founded. The allegations against the Southern Pacific outlined herein were before the Commission and were considered by it." (R. 5202)

"The question of the feasibility of a lease is, of course, a matter within the exclusive jurisdiction of the I.C.C. (49 U.S.C. 5). This, as well as a determination of the validity of Meyer's charges of bad faith, are matters requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements, and other data peculiarly within the comprehension of the I.C.C. We are of the opinion that the Commission has had full opportunity to pass on these matters and exercise informed judgment. We are, therefore, not disposed to refer the plan back to the Commission on this account and, accordingly, overrule Meyer's objections to the plan of reorganization." (R. 5203)

Appeals from the District Court's order approving the plan were filed in the Circuit Court of Appeals by the Debtor, Respondent and Meyer. In November, 1944, Meyer filed in the Circuit Court of Appeals a motion that the appeal be stayed or, in the alternative, that the proceedings be remanded to the District Court (R. 5287-5493). The Court set the motion for hearing in connection with the hearing on the merits (R. 5553). The case was argued on April 6 and 7, 1945. Decision was rendered by the Circuit Court of Appeals on August 26, 1946, affirming, except for one point not here material, the order of the District Court denying the motion to remand (R. 5559-5680). Petitions for rehearing were filed, and denied on October 22, 1946 (R. 5831).

The Circuit Court devoted a large part of its opinion to Meyer's charges. It summarized them thus (R. 5577-5578):

"(1) *Validity of the Valuation when Made.* The validity of the valuation of the Commission at the

time it was made is challenged upon four general grounds as follows. First, it is contended that, during such period, there was diversion of freight from Debtor causing revenue loss to it, by other railroads controlling Debtor. Second, it is contended that, during this period, certain kinds of freight were forced upon Debtor by a controlling railroad (Pacific) and from carriage of which, Debtor suffered loss in revenue. Third, it is contended that during the period, there was wastage of Debtor's assets by a controlling railroad.[3] Fourth, that there was a continuing conspiracy by those controlling Debtor to use Debtor for their selfish purposes to its harm."

As to the charge of diversion of traffic the Circuit Court carefully reviewed and rejected Meyer's contentions as is shown by the following excerpt from its opinion (R. 5587-5588, 5627):

"Our immediate concern is whether the showing before the Commission justified its determination that no improper material diversions of traffic resulted from such controls of Debtor occurred. In determining this matter, we act under definite limitations. We cannot, as would a court in an equity suit, take the evidence before the Commission and declare an opposite conclusion if, in our judgment, the weight of the evidence was against the determination of the Commission. The Commission is the agency selected by the Congress to determine such fact matters. If there is substantial support in the evidence for its determination, we must accept it as settled (*Reconstruction Finance Corporation, et al. v. The Denver & Rio Grande Western R. Co.*, ... U.S. .... (June 10,

3. This charge related to a period prior to Respondent's acquisition of control of Debtor.

1946); *Ecker, et al. v. Western Pacific R. Co., et al.*, 318 U.S. 448, 473, 512).

Our examination involves, of course, a test comparison of the various essential fact statements of the Commission with the evidence bearing upon each material statement to ascertain whether there is substantial support for the finding in the evidence or the action of the Commission was arbitrary. Considering the great number of separately advanced particulars in each of which Mr. Meyer urges positive proof of diversion and the several thousand pages of evidence involved, these testing comparisons have required an enormous burden of reading, study and classification of the evidence. This burden has in no respect or particular been avoided. We have reached the conclusion that the results stated by the Commission are in every instance supported by substantial evidence and, therefore, the capitalization value of the Debtor as determined by the Commission must be sustained as of the time it was announced and, by supplemental report, later affirmed.

In the footnote, is set out most, but not all, of the discussion by the Commission in its report and supplemental report on this subject of diversion of traffic by the four controllers of Debtor up to the filing of the supplemental report on March 9, 1942, on a submission as of October 8, 1941. We adopt this method of presentation in this opinion for several reasons. These extracts show the care, thoroughness and detail with which the Commission examined every one of the numerous matters bearing upon traffic diversion urged by Mr. Meyer. They show the great variety of elements presented and the complexity of the entire contention. When the character of our examination—to test the evidence to determine whether

the findings of the Commission have substantial support therein—is considered and in view of our determination that there is such support, we think these extracts show ample reason why an unduly long and involved opinion treating separately each of these elements is not called for. In many instances, there was conflict in the evidence which the Commission might have ruled either way but such conflicts are for it, with its greater expert training and experience, to resolve and not for us. In other instances, suspicion, inference and possibility appeared in place of evidence of diversion."

On the question of unprofitable traffic the Court found (R. 5630):

"Statements in the report of the Commission are as set forth in the footnote. The conclusion of the Commission is that this traffic was carried at a small profit. The evidence is conflicting and we find there is material evidence supporting the conclusion of the Commission."

Finally, as to the question of conspiracy, the Court found (R. 5639-5640):

"The basis of Mr. Meyer's position in this entire controversy is a series of conspiracies by those successively in stock control of Debtor to its detriment. That there were opportunities, through these controls, for some or all of such conspiracies seems evident. The Commission, in its report, devoted much consideration to this subject. It concluded, correctly we think, that the existence of such conspiracies was material in this reorganization proceeding only as the effect thereof bore upon the earnings and assets of Debtor. If the net earnings were reduced thereby

or if a recovery of damages resulting from illegal conspiracies—anti-trust damages—such matters would affect the valuation for reorganization capitalization purposes.

Mr. Meyer has endeavored to show the actual harmful effects through diversion of traffic and the other respects which we have heretofore considered. The Commission found against Mr. Meyer in all of these matters and we have determined hereinbefore that there was material evidence to sustain such findings."

SUMMARY OF ARGUMENT

I.

The refusal of the Court below to grant an independent review of the Commission's findings of fact with respect to Petitioner's contentions is not contrary to decisions of this Court. Petitioner's charge, that Debtor's past earnings upon which the Commission's valuation was based had been impaired by illegal acts of Respondent and others, so that the valuation was unduly low, relates to a matter of valuation. It is settled by decisions of this Court that the Commission's findings with respect to valuation matters are binding if supported by substantial evidence. *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 472-473; *Group of Investors v. Milwaukee R. Co.*, 318 U.S. 523, 541-542; *Reconstruction Finance Corp. v. Denver & R.G.W. R. Co.*, 90 L. Ed. 1134, 1140-1141. Petitioner's further contention that Respondent's claim should be expunged was not open to review at all, as the lower courts held, because of Petitioner's failure to interpose objections to the claim when it was filed with the District Court and

allowed after trial of objections by others. The allowance of the claim was a judgment *in rem* binding all interested parties (*Gardner v. State of New Jersey,* No. 92 this term, January 20, 1947), and could not be collaterally attacked by Petitioner in the proceedings to review the Commission's plan of reorganization. Nevertheless, the lower courts did, in effect, review the Commission's findings with respect to this charge, to see if they were supported by substantial evidence, since both charges were based on the same facts, and in reviewing the facts as to the valuation contention the lower courts necessarily reviewed the facts with respect to the validity of Respondent's claim. Since the facts with respect to both charges were identical, and the need for free play of the Commission's expertise in technical transportation problems was the same with respect to both charges, the decisions of this Court limiting judicial review of the Commission's findings on valuation matters are equally applicable to restrict review of the findings with respect to the validity of Respondent's claim. The fact that the District Court was empowered to, and did take additional evidence, does not expand the scope of its review over the Commission's findings of fact. *Ecker v. Western Pacific R. Corp., supra,* 477. Nevertheless, the evidence taken was considered, although it was actually either improperly admitted or immaterial, and therefore could properly be disregarded.

II.

No reviewable question is presented in respect of adequacy of investigation by the Commission or the District Court. Whether and to what extent investigations shall

be conducted are administrative questions for the Commission within its discretion and not subject to judicial review (*State of North Carolina v. United States* (D.C.E.D. N.C.), 56 Supp. 606, 617. But the Commission was not lax in its duty to investigate. It caused an investigation of certain of Meyer's charges of diversion of traffic to be held, the results of which were introduced into the record. Petitioner was given the greatest latitude to prove his charges at extensive hearings, and was given access to the files of the Debtor and to its correspondence with many other railroads. The District Court likewise conducted a thorough investigation through the trustee. In his report the trustee recites that he gave Petitioner a full opportunity to present his charges. Petitioner took no exception to these reports and made no motion in the District Court for any other investigation by the trustee. In the absence of any ruling by the Court upon which there was a ruling adverse to the Petitioner, there is nothing for the consideration of this Court. *McCullough v. Kammerer Corp.*, 323 U.S. 327.

III.

The Circuit Court was correct in denying Petitioner's motion to remand and its action is not contrary to decisions of this Court. Insofar as the motion was based on the bringing of an antitrust suit by the Government against all the major western railroads, including Debtor, subsequent to the trial below, the motion was properly dismissed because the suit would not have any effect upon the decision in the instant case and is of very doubtful relevance. Insofar as the motion was based upon the "Western Agreement" between various western railroads,

as set forth in the complaint in the above antitrust suit, it was also properly denied. The motion was filed after expiration of the appeal time and therefore was not timely. In addition, the agreement was not newly discovered evidence. Petitioner had long known of it, since he had voted in favor of Debtor's adhering to it, and also voted for the appointment of Debtor's representative to administer the plan provided by the agreement. Decisions of this Court requiring the independent judgment of the court in bankruptcy proceedings, regardless of parties' actions, are not applicable here where the proceedings were clearly adversary in nature. It would have been unfair to other litigants to have excused Petitioner from compliance with fundamental procedural principles generally applicable. Furthermore, the Western Agreement was not evidence which would have forced a different result in the event of a rehearing, since the agreement was adopted by the parties for their mutual benefit to conserve their revenues.

IV.

Judge Moore's refusal to grant a new trial after the death of Judge Davis was not a departure from the usual course of judicial proceedings and raised no important federal question. In view of the fact that the scope of the Court's review of the Commission's findings was limited to the legal question of the existence of substantial supporting evidence, the situation is precisely comparable to that where a judge is called upon to rule upon a motion for a new trial of a case heard by a deceased predecessor because the decision is not supported by substantial evidence. In the latter situation it has long been recognized

that the fact that the successor judge has not had an opportunity to observe the witnesses is unimportant, and that he may rule on the motion. *New York Life & Fire Insurance Co. v. Wilson*, 8 Pet. 291, 303. The same rule is applicable here to permit a successor judge to decide the case without granting a new trial. Failure to apply this rule would lead to great delay, which is contrary to the need for expedition. That was a principal reason for the enactment of Section 77. In any event, Petitioner was not injured by the refusal to grant a new trial, since he was given an opportunity to move for the taking of any additional evidence before Judge Moore, but never availed himself of this opportunity.

ARGUMENT

POINT I

The District and Circuit Court's Determination that the Commission's Findings with Respect to Petitioner's Charges of Misconduct with Respect to Debtor by Respondent and Others Were Binding if Supported by Substantial Evidence Was Not in Conflict with Decisions of This Court.[4]

Petitioner, as pointed out in the Statement, made two principal charges before the Commission and the lower courts, now reiterated here: (1) that Debtor's earnings during the period from 1927 to 1941, upon which the Commission's valuation was based, were impaired because of alleged illegal acts with respect to Debtor by Respondent and others, thus making the prescribed valuation unduly low; (2) that Respondent's claim should be expunged or

4. This heading relates to Point I of Petitioner's argument (brief, p. 26) and to question 2 of his petition (petition, p. 16).

at least subordinated because of its alleged illegal acts with respect to Debtor. As we have seen, the Commission, after exhaustive hearings on these charges, made detailed findings of fact upon which it concluded they were without foundation. Both the District Court and the Circuit Court concluded that these findings were binding if supported by substantial evidence, denying an independent review in the sense that they refused to weigh the evidence taken before the Commission. Both Courts concluded that the Commission's findings were supported by substantial evidence. Petitioner complains of this failure of the Courts to weigh independently the evidence taken before the Commission.

Petitioner's first charge relates obviously to a matter of valuation. This Court has, as the Circuit Court recognized (R. 5587-5588), in unmistakable language on three occasions, held that all valuation matters are primarily for the Commission and that the judicial function of review does not extend to weighing the evidence but only to ascertaining whether the Commission's findings are supported by substantial evidence, and whether it has followed proper legal standards. *Ecker v. Western Pacific R. Corp.*, 318 U.S. 448, 472-473; *Group of Investors v. Milwaukee R. Co.*, 318 U.S. 523, 541-542; *Reconstruction Finance Corp. v. Denver & R.G.W. R. Co.*, 90 L. Ed. 1134, 1140-1141. In the case first cited this Court declared (318 U.S. 448, 472-473):

> "The power of the court does not extend to participation in all responsibilities of the Commission. Valuation is a function limited to the Commission, without the necessity of approval by the court. The first sentence of the last paragraph of subsection (e) provides:

> 'If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the court in its report on the plan.'
>
> The function of valuation thus left to the Commission is the determination of the worth of the property valued, whether stated in dollars, in securities or otherwise. One of the primary objects of the bill was the elimination of obstructive litigation on the issue of valuation and the form finally chosen approached as near to that position as seemed to the draftsmen legally possible. Judicial reexamination was not considered desirable. None of the findings required of the judge under subsection (e) relate specifically to valuation. Congress aparently intended to leave the determination of valuation 'of any property for any purpose under this section' to the Commission. The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards. It leaves open the question of whether in reaching the result the Commission had applied improper statutory standards.''

Plainly, instead of the Circuit Court's action being contrary to these decisions, as Petitioner contends (Pet. pg. 20), it was expressly required by them.

Petitioner's argument that he was entitled to an independent judicial review at this stage of the proceedings of his other contention that Respondent's claim should be expunged is equally without substance.

The District Court concluded (supra pg. 16), that the validity of Respondent's claim was "no longer open to question" (R. 5199). It reached this conclusion on the ground that Petitioner had failed to exercise the opportunity given him to file objections to Respondent's claim in accordance with the procedure prescribed by the Court under 11 U.S.C., sec. 205(c) (7),[5] and on the ground that an objection duly filed by certain of Debtor's foreign bondholders to Respondent's claim had been overruled by the Court after extensive hearing and the claim allowed. The attack upon Respondent's claim by the foreign bondholders was similar to that made by Petitioner, since they charged that the claim should be expunged or subordinated because of alleged mismanagement of Debtor by Respondent (R. 3982, 3996, 3998). The Circuit Court apparently also took the view that the question of the validity of Respondent's claim was no longer open to question since it treated Petitioner's contentions of illegal conduct by Respondent and others as going only to the validity of the valuation when made (R. 5575-5578). It did deal with a contention by the United States as *amicus curiae* that Respondent's claim should be expunged (R. 5640-5645).[6]

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5. This section provides in part:
"The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced, and after which no claim not so filed or evidenced may participate, except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed. . . ."

6. The Government, whose appearance was described by the Court as "smacking of inspiration" (R. 5645) had advanced the argument that Respondent's claim should be expunged because of its failure to cause the Debtor to bring a treble damage suit under the anti-trust laws against Kansas City Southern Railroad,

The Courts below were clearly correct in this position. It is settled that an order of a bankruptcy court allowing a claim is a judgment *in rem* binding all interested parties, whether or not they personally objected to the claim. *Wheeler v. Smith* (C.C.A. 9), 30 F.(2d) 59, 61; *In re Hawkins Mortgage Co.* (C.C.A. 7), 66 F.(2d) 16, 18, certiorari denied, 291 U.S. 659; *Gardner v. State of New Jersey* (No. 92 this term, decided January 20, 1947. In the *Gardner* case this Court declared (pg. 6):

> "A proof of claim is, of course, *prima facie* evidence of its validity. *Whitney v. Dresser,* 200 U.S. 532. But the bankruptcy court whose aid is sought for enforcement of an asserted claim is not bound to treat the tendered proof as conclusive. When objections are made, it is duty bound to pass on them. That process is, indeed, of basic importance in the administration of a bankruptcy estate whether the objective be liquidation or reorganization.
>
> It is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure . . . The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a *res.* It is none the less such because the claim is rejected *in toto,* reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash."

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which, it was alleged, had earlier controlled Debtor illegally. The Circuit Court rejected this contention because it concurred in the Commission's finding that Debtor had not been injured by such control and hence that there was no probability of the existence of a cause of action under the antitrust laws (R. 5645). It is highly significant that the Government, which, of course, has the primary responsibility of enforcing the antitrust laws, never brought any action under those laws against the Kansas City Southern.

The only remedy which an interested party may have in respect of a claim which has been allowed by a bankruptcy court, is to move for a reconsideration of the order allowing the claim in accordance with 11 U.S.C. Sec. 93(k), which provides:

> (k) Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed.

Presumably this section is made applicable to Section 77 proceedings by 11 U.S.C. Sec. 205(1).[7] But this procedure is the exclusive method provided for the review of claims which have been allowed. *In re Hochman* (D.C.E.D. N.Y.) 57 F. Supp. 312, 313; *In re L. H. Seifer & Sons, Inc.* (C.C.A. 7), 78 F.(2d) 196, certiorari denied, 296 U.S. 618; *In re Roanoke Furnace Co.* (D.C.E.D. Pa.), 152 Fed. 846. An order allowing a claim in bankruptcy cannot be attacked collaterally. *Wheeler v. Smith, supra; In re Hawkins Mortgage Co., supra; Seemann v. National Bank of Commerce of Houston* (C.C.A. 5), 112 F.(2d) 378, 380; *In re Roanoke Furnace Co., supra; Sampsell v. Imperial Paper Corp.,* 313 U.S. 215, 219. Petitioner chose neither to file an original objection to Respondent's claim, nor to pursue the remedy of a petition for reconsideration. Instead he resorted to a collateral attack on the order allowing the

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7. This paragraph provides:
"In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

claim in the proceedings before the Commission and the Court to work out and approve the plan. Clearly such a collateral attack cannot be maintained. It would be intolerable if a creditor, after proving its claim upon a lengthy trial, should be required to prove its claim subsequently, solely because a stockholder chose not to file his objections within the time fixed by the Court for their filing. The procedure for the proving of claims is set up to provide an orderly and reasonably expeditious method of having such matters determined. For a stockholder to refuse to follow such procedure and to insist upon the retrial of a claim which had been previously allowed, would be inconsistent with the expedition in Section 77 proceedings which this Court has held to be desirable. *Continental Bank v. Rock Island Ry.*, 294 U.S. 648, 685.

But even though consideration of Petitioner's contention that Respondent's claim should be expunged is thus completely foreclosed, it is evident that the District and Circuit Court did, in effect, review it to see whether the Commission's findings rejecting it were supported by substantial evidence. This is because the facts relied upon to support both Petitioner's contentions, that the valuation was based on earnings impaired by illegal acts, and that Respondent's claim should be expunged because of its illegal acts, were virtually identical. Petitioner, himself, admits this in his brief (pg. 34). He states there:

> "Any differentiation in these proceedings as to the extent and scope of the review required by the courts as between the two issues would be purely academic as all of the proof relevant to the issue as to whether debtor's earnings were illegally impaired is also relevant to the issue as to whether Southern Pacific's claim should be subordinated or expunged."

Necessarily, then, in passing upon the substantiality of the evidence as to Petitioner's valuation contention, the lower courts passed upon the substantiality of the evidence relating to his contention with respect to Respondent's claim.

Also, since the facts relating to this latter contention are identical with those relating to the valuation contention, the aforementioned decisions of this Court, limiting the scope of review to the question of the existence of substantial evidence in the valuation field (*supra,* pg. 26) are equally applicable with respect to review of the Commission's findings on this latter contention. The same complicated and technical transportation problems requiring judicial abnegation in order to give free play to the Commission's expertise (*Rochester Telephone Corp. v. United States,* 307 U.S. 125, 138-140), are applicable in both instances. As indicated above, Petitioner admits that "any differentiation in these proceedings as to the extent and scope of the review required by the courts as between the two issues would be purely academic." With this we agree. Furthermore, virtually the only place where findings of fact of an administrative body will receive an independent judicial review is in the narrow field where the facts are "constitutional facts," the constitutionality of the administrative action depending upon the determination of a factual issue. *Ohio Valley Water Co. v. Ben Avon Borough,* 253 U.S. 287; *Crowell v. Benson,* 285 U.S. 22; *St. Joseph Stockyards Co. v. United States,* 298 U.S. 38; *Baltimore & Ohio R. Co. v. United States,* 298 U.S. 349. Cf. *Transamerican Freight Lines v. United States* (D.C. Del.), 51 F. Supp. 405, 409. Certainly Petitioner has no constitutional right to have Respondent's

claim expunged which is contingent upon the Commission's determination of factual issues.

Petitioner might have secured the independent judicial determination of the validity of Respondent's claim which he now seeks, if he had followed the orderly procedure, considered above, of objecting before the Court when this claim was presented for allowance. Having failed to do so, and having, instead, sought to try the issue in the first instance before the Commission, he cannot now be heard to complain that the reviewing court erred in applying the customary rule of "administrative finality" to the Commission's determinations of fact.

The fact that the District Court is empowered to, and did, in the present case, take additional evidence, does not expand the scope of its review over the Commission's findings of fact on issues of valuation, and kindred issues such as are here presented. This was plainly recognized by this Court in *Ecker v. Western Pacific R. Corp., supra,* 477, where it was said:

> "Thus, while judicial review does not involve an independent examination into valuation, it does require that the Court shall be satisfied, upon the record before the Commission, with such additional evidence as may be pertinent to the objections to the Commission's findings of value, that the statutory requirements have been followed."

Petitioner's statement that the evidence introduced by him before the District Court was not considered by either the District Court or the Circuit Court (brief, pg. 32), is without foundation. This is shown by the following statement of the District Court in its opinion (R. 5202):

> "We believe that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of the various allegations and objections . . . He has not convinced either this Court or the Commission that his charges are well founded."

The Circuit Court also mentioned the fact that evidence was taken before the District Court (R. 5569) and thus, in the absence of anything to the contrary, such evidence in the record must be presumed to have been considered by it.

In fact, however, all the evidence taken before the District Court with respect to Petitioner's charges was either improperly introduced or else immaterial and hence could properly be disregarded. Judge Davis, at the beginning of the trial, ruled that the testimony before him would be restricted to the period occurring subsequent to the consideration of the plan by the Commission (R. 4186). Petitioner does not attack this order, which was plainly in accord with the usual practice in cases of judicial review of administrative proceedings. *National Broadcasting Co. v. United States,* 319 U.S. 190, 227. Nevertheless, considerable documentary evidence relating to the period prior to that time was introduced by Petitioner (R. 5569). Such evidence was introduced in violation of the Court's order, and could properly be disregarded. Insofar as Petitioner's evidence related to the period subsequent to the Commission's consideration of the case, it was not material with respect to any of the contentions made by Petitioner below and in this Court. Obviously, evidence relating to the Debtor's situation during the period subsequent to the Commission's decision would not be ma-

terial on the issue as to whether its earnings were depressed during the earlier period considered by the Commission. On the issue of expunging Respondent's claim such evidence was equally immaterial since all such evidence related to a period subsequent to the commencement of the bankruptcy proceedings. Yet, it has been held time and again that the rights of creditors are fixed, both as to the bankrupt and between themselves, as of the date of filing the petition in bankruptcy. *United States v. Marxen,* 307 U.S. 200, 207; *Sexton v. Dreyfus,* 219 U.S. 339, 344; *White v. Stump,* 266 U.S. 310, 313. Seasonable objection was made by Respondent to the taking of this evidence (R. 4328, 4333).

It is evident that Petitioner's real aim is to have this Court reconsider in minute detail the great volume of conflicting evidence which has failed to convince the Commission and two lower courts that the facts were as petitioner alleges. The only dispute is as to the facts, since Respondent has never denied its legal duty to Debtor and its minority stockholders under such cases as *Taylor v. Standard Gas & Electric Co.,* 306 U.S. 307. And the Commission correctly stated and applied the legal and equitable standards by which the conduct of Respondent, as a majority stockholder, should be judged (R. 3640, 3669, 3670). Aside from the Herculean nature of such a task, it is evident that such factual questions, while of importance to Petitioner, are not of such general importance as to warrant review by this Court.

POINT II

No Reviewable Question Is Presented in Respect of Adequacy of Investigations by the Commission or the District Court.[8]

Insofar as the alleged failure of the Commission to conduct an investigation is concerned, it is a sufficient answer to the Petitioner to point out that the question whether the Commission should institute an investigation under Sec. 12 of the Interstate Commerce Act (49 U.S.C. Sec. 12) is an administrative one within its sole discretion and not subject to judicial review. Section 12 of the Interstate Commerce Act gives the Commission the authority to inquire into the management of the business of common carriers and to keep itself informed as to the manner and method in which such business is conducted. As a result of such investigations it may make recommendations to Congress. It is made the duty of any district attorney of the United States, under the direction of the Attorney General, to prosecute violations of Part I of the Interstate Commerce Act which may be brought to light in such investigations. Clearly, in conducting such an investigation the Commission is performing a legislative or administrative act. No right capable of judicial enforcement is vested in any individual. Moreover, where, by other sections of the Interstate Commerce Act, Section 13 (49 U.S.C. Sec. 13), for instance, the Commission is directed to conduct investigations of certain character upon the complaint of specified parties, decision as to whether or not the investigation will be made is within the Commission's discretion. *State of North Carolina v. United States* (D.C., E.D., North Caro-

8. This heading relates to Point II of argument in Meyer's brief, pages 37-42, and to question 3, page 17 of his petition.

lina), 56 F. Supp. 606, 617 (reversed on other grounds, *North Carolina v. United States,* 325 U.S. 507); *Labor Board v. I. & M. Electric Co.,* 318 U.S. 9, 18.

But we cannot permit the accusation that the Commission was lax in the performance of its duties to go unchallenged. Initially, the Commission did cause an investigation of Meyer's charges of alleged diversion of business from the Debtor by Kansas City Southern Railway Company and other southwestern carriers during the years 1927, 1928 and 1929, which resulted in the Boyd Report to the Commission, in which the conclusion was reached that no proof of diversion of traffic had been found (R. 3601-3602). This report occupied approximately eleven months of the time of a special agent of the Commission (R. 3600). Meyer filed a petition and a supplemental petition with the Commission, in which he asked both for an investigation and for an opportunity to introduce, himself, evidence in support of his charges (R. 339-351, 357-432). The proceeding was reopened by the Commission and Meyer given an opportunity to introduce any relevant testimony (R. 501). Meyer was given the greatest latitude in the ensuing hearings, which took from May 5 to May 27 and from September 18 to September 30, 1939. He made application for a subpoena *duces tecum* for the production of records by Respondent. Many of the matters requested were produced (R. 1598, 1600, 1604, 1605). Some of the requests were rejected as unreasonable (R. 3672-3674). Meyer was permitted to amend his application for a *duces tecum* subpoena (R. 1621, 1661), but did not do so. He was given access to the files of the Debtor and to its correspondence with Respondent and many other railroads (R. 3549, 3674-3675). The care with

which the Commission dealt with Meyer's claims is evidenced by the fact that 131 pages of its first report (R. 3547-3678) and ten pages of its supplemental report (R. 3742-3752) are devoted to discussion of them. It concluded (R. 3675):

> "We are of the view that Meyer has had a full and fair opportunity to obtain and present evidence in support of his charges, and that such charges have been sufficiently investigated. The request for a reopening of the proceeding is denied."

And again (R. 3747):

> "The petitioner's charge that he was not afforded a fair opportunity to prove his case was sufficiently discussed in our prior report. We adhere to our former determination on this point."

The impressive thing about this case is the care with which Meyer's claims have been examined.

Little need be said about Meyer's claim that the District Court did not investigate his charges. In accordance with the provisions of Section 77 of the Bankruptcy Act, 11 U.S.C. Sec. 205(c)(9), the District Court directed the trustee to report as to any irregularities, misconduct or mismanagement (R. 3903). The trustee made reports in which he advised that, upon investigation, he found no evidence of misconduct or mismanagement (R. 3903-3951). The trustee's report of February 23, 1937, recites (R. 3906-3907):

> "Immediately following the Trustee's appointment, he had numerous conferences with Walter E. Meyer, a stockholder of St. Louis Southwestern Railway Company, and gave Mr. Meyer full opportunity to present informally a summation of the alleged facts

> which he contends resulted in the existence of causes of action in favor of the principal Debtor, as well as a large number of written statements and other documents relating thereto, including briefs filed in court and Interstate Commerce Commission proceedings hereinafter referred to."

Meyer took no exceptions to these reports and made no motion in the District Court for any other investigation by the trustee. Indeed, the District Court states in its opinion, "We do not understand that Meyer accuses the trustee of any bad faith or lack of diligence" (R. 5202). In the absence of any objection or motion in the District Court upon which there was a ruling adverse to the Petitioner, there is nothing for the consideration of this Court. *McCullough v. Kammerer Corp.*, 323 U.S. 327.

POINT III

The Circuit Court of Appeals Was Correct in Denying the Petitioner's Motion to Remand and Its Action Is Not Contrary to Decisions of This Court.[9]

Meyer filed a motion in the Circuit Court of Appeals in November, 1944, requesting that the appeals be stayed or, in the alternative, that the proceedings be remanded to the District Court (R. 5287-5493). A reply and a memorandum in opposition were filed, respectively, by Respondent (R. 5495-5514) and by Chase National Bank and other appellees (R. 5515-5533). The motion was set for hearing by the Court in connection with the hearing upon the merits of the appeals (R. 5553) and was denied in the Court's opinion rendered August 26, 1946 (R. 5569-5573).

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9. This Point III relates to Meyer's 4th question, page 18, his petition, and to Point III of his argument, pages 42 to 47, his brief.

To the extent that the motion is based upon the improved financial position of the Debtor it goes to the merits of the case which will be before this Court if the petitions for certiorari by the Debtor and Respondent are granted herein. In its other aspects the motion was not well founded, as the Circuit Court of Appeals found.

Meyer argues, page 44 of his brief, that the cause should have been remanded because his motion revealed (a) new developments, viz., a suit by the Government against all major western railroads to enjoin acts alleged to be contrary to the antitrust laws, and (b) facts (principally the execution by Western railroads of the "Western Agreement") existing prior to the trial in the District Court but newly discovered by Meyer from the complaint in the Government's antitrust suit.

The suit by the Government was a development occurring after the trial below. Such a development may be brought to the attention of an appellate court in any appropriate manner (*Walling v. Reuter Co.*, 321 U.S. 671, 676; 12 *Cyc. Fed. Proc.* Sec. 6268, p. 417), but to warrant the case's being remanded, it would have to appear clearly that the existence of the new development would change the result below (*Institutional Investors v. Chicago M., St. P. & P.R. Co., supra*), and Meyer, as the moving party, would have to demonstrate that fact. Actually, the suit would not have any effect upon the decision and is of very doubtful relevancy. The outcome of the antitrust suit will not be known for a long time,[10] and whether it will affect

10. Two years after the motion was made the suit has still not been brought to trial. To hold up the present case pending the outcome of that suit would not be in keeping with the expedition considered desirable in Section 77 proceedings. *Continental Bank v. Rock Island, supra,* 685.

the fortunes of the Debtor is problematic. The Department of Justice may conceive that the ultimate sustaining of its contentions will benefit shippers and the public generally, but it is doubtful, to say the least, that such a result would benefit Debtor, one of the defendants in the suit; nor would it affect control of the Debtor by Respondent, which is not involved in the suit and which was approved by the Interstate Commerce Commission under Section 5 of the Interstate Commerce Act in *St. Louis S. W. Ry. Co. Control,* 180 I.C.C. 175. Meyer suggests, on page 46 of his brief, that if the Government should win this suit, the Debtor might benefit because it would lose the perishable traffic from the West Coast which it is now able to handle, despite a longer route, under agreed schedules. He bases his statement upon his assertion that the perishable traffic is unprofitable. But the Comptroller of the Debtor determined from a study made by him that some profit was realized from the traffic (R. 1673-1680), and the Commission accepted this view (R. 3637). The Debtor prior to the trusteeship, and the trustee appointed by the Court thereafter, have actively solicited for the perishable traffic. Also, the break-down of schedule agreements would handicap the Debtor in competing for other West Coast business. Thus, the development anticipated by Meyer from the antitrust suit would harm, and not benefit, the Debtor. Meyer states, further, that if the defendant railroads lost the antitrust suit, Respondent would not have inducement to withhold traffic aid from the Debtor. His reasoning is obscure and the premise is faulty, since the Commission has found that Respondent has consistently aided the Debtor in traffic matters to the extent required (R. 3669, 3670).

The "Western Agreement," set forth in the Government's complaint in the antitrust suit, is not a new development, since it became effective on December 1, 1932 (R. 5426), and was cancelled on April 23, 1943 (R. 5414). For the "Western Agreement" to be a basis for remanding the case by the appellate court to the District Court for a new trial, three conditions would have to exist: A motion for a new trial in the District Court would have to be timely, the evidence would have to be newly discovered, and the evidence would have to be of such weight and importance as to indicate that a rehearing would probably produce a different result.

A motion for a new trial in the District Court on the ground of newly discovered evidence must be filed before the expiration of the time for an appeal. Rule 59(b), *Rules of Civil Procedure for the District Courts of the United States.* A motion filed after that time may not be considered even though an appeal was taken. *Checker Cab Co. Inc. v. Markland* (App. D.C.), 142 F.(2d) 95. The time for filing an appeal from the judgment below had long since expired when Meyer filed his motion for remand.

Although Meyer alleged in his motion that the "Western Agreement" was "newly discovered evidence" (R. 5289, 5320), these allegations were not correct. It appears in the record, without dispute, that Meyer had known of the "Western Agreement" for many years, since he, as a member of the Board of Directors of the Debtor, voted for the approval of that agreement by that Company in July, 1932 (R. 5502-5503), later voted for the appointment of a representative of the Debtor to administer the Commissioner plan provided by the "Western Agreement" (R. 5503-5504), and introduced an exhibit concerning it at the Com-

mission's hearings (R. 937-939). He now says that he did not fully appreciate the character of the "Western Agreement." It is settled law that the subsequent discovery of the importance of evidence which was in the possession of a party at the time of the trial does not entitle him to a new trial upon the ground of newly discovered evidence. *United States v. Bransen* (C.C.A. 9), 142 F.(2d) 232, 235; 39 *Am. Jur.* 166.

This is an adversary proceeding in which Meyer is seeking to subordinate the debt owing Respondent to his stock interest, and, in fairness to the other litigants in the case, he cannot be excused from procedural principles generally applicable. A litigant must be bound by time limitations applicable to others in the case and may not be excused from the reasonable requirement that he must produce his evidence at the time of trial. The decisions of this Court requiring a bankruptcy court's independent judgment, regardless of the acts of the parties, to which Petitioner asserts this Court's action was contrary (brief pg. 46), involved situations where third parties stood to be injured by the consent action of other parties not adversaries of each other. They are inapplicable here.

Moreover, if all procedural matters are brushed aside, the "Western Agreement" still does not provide any reason for interfering with the judgment below. The "Western Agreement" was adopted by practically all railroads operating west of the Mississippi, for the purpose of aiding such railroads who were parties to it, through the conservation of their revenues. It recites that it was for the mutual benefit of the parties, of which the Debtor was one (R. 5428). Commissioner Eastman testified concerning the "Western Agreement" before the Senate Committee on

Interstate Commerce, at the hearings on S. 942 78th Congress, 1st Session (pgs. 831-834) (R. 5507-5508), as follows:

> "It [the Commissioner plan of the 'Western Agreement'] was designed to put a brake upon competitive waste and extravagance, although it was so drawn that it did not in the last analysis debar carriers from individual action. I sympathized with the idea which this plan undertook to implement. My impression, however, is that it was never particularly effective, and now seems to be on its way out. That it had no sinister purpose I am convinced. There never was any secret about it, although it appears that a copy of the agreement was not filed with the Commission, as probably should have been done. You will find that the railroads were enjoined in the Emergency Act of 1933 to create committees and to bring about these eliminations of wasteful competition."

If the fact that the "Western Agreement" was in existence from 1932 to 1943 is relevant in the reorganizations of the parties thereto, it has been overlooked in the reorganization of every one of the western railroads which have resorted to Section 77 of the Bankruptcy Act.

POINT IV

Judge Moore's Refusal to Grant Petitioner a New Trial on the Death of Judge Davis, Who Had Originally Heard the Case, Was Not a Departure from the Usual Course of Judicial Proceedings Warranting an Exercise of This Court's Supervision and No Important Federal Question Is Raised by This Action.[11]

Judge Moore's action in refusing Petitioner a new trial on the death of Judge Davis, who had originally heard the case, and in, instead, considering the case on a transcript of the record made before the Commission and Judge Davis, was not, as Petitioner urges, a departure from the usual course of judicial proceedings.

Admittedly, in the usual judicial proceedings where the court conducts a trial *de novo* and makes its own findings of fact the weight of authority is to the effect that the death of the judge who has heard the evidence before he has made findings of fact requires a new trial. *Worden v. Alexander,* 108 Mont. 208, 90 P.(2d) 160, 161. On the other hand, it has been equally well settled since the days of John Marshall that in the federal courts a successor judge not participating in the hearing may rule on a motion for new trial. *New York Life & Fire Insurance Co. v. Wilson,* 8 Pet. 291, 303; *Meldrum v. United States* (C.C.A. 9), 151 Fed. 177, 182; *King v. United States* (C.C.A. 6), 25 F.(2d) 242, 244. As the Supreme Court put it in the case first cited:

> "But the district judge is mistaken, in supposing that no one but the judge who renders the judgment, can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right

11. This heading relates to Point IV of Petitioner's argument (brief, p. 47) and to question 1 of his petition (petition, p. 16).

> to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbents cannot and ought not, in any respect, to injure the rights of litigant parties."

This is also the rule by the weight of authority in the state courts. *People ex rel. Hambel v. McConnell,* 155 Ill. 192, 40 N.E. 608, 610. Likewise it is clear that a successor judge has power to pass upon a reserved motion for a directed verdict. *Thomas-Bonner Co. v. Hooven, Owens & Rentscheler Co.* (C.C.A. 6), 284 Fed. 386, 392-393; *Cahill v. Mayflower Bus Lines* (C.C.A. 2), 77 F.(2d) 838, 839.

The principal reason cited by the cases for refusing to let a new judge decide the facts in a case upon a record made before a deceased predecessor is that he has had no opportunity to see and hear the witnesses. Some of the decisions which have authorized a successor judge to hear a motion for new trial have deprecated this factor there on the ground that the successor judge should attach the same weight as an appellate court would to his predecessor's findings of fact and should not grant a new trial unless there is clearly no reasonable support in the evidence for his predecessor's findings. *People ex rel. Hambel v. McConnell, supra,* 40 N.E. 608, 610; *Gibson v. Morris State Bank,* 49 Mont. 60, 71, 140 Pac. 76, 79. In applying this power, as thus limited, the judge is merely passing on a question of law, the legal sufficiency of the evidence, rather than one of fact (*Potter v. Great Northern Ry.,* 167 Minn. 168, 208 N.W. 641), and the real reason for granting him this power while denying him the right to decide the facts in the first instance is finally apparent.

When this real reason for these different rules is fully appreciated, it is plain that, as the Circuit Court correctly ruled (R. 5568), the successor judge's position in reviewing and approving a reorganization plan proposed by the Commission is comparable to that of a successor judge in passing upon a motion for new trial based on insufficiency of the evidence to support the verdict. As pointed out in Point I of the Argument, he is in such a case entitled only to pass upon the question of whether there is substantial evidence in the record before the Commission to support its findings of fact, notwithstanding the fact that he is permitted to take additional evidence. This is precisely the same question of law, rather than of fact (*Reconstruction Finance Corporation v. Bankers Trust Co.*, 318 U.S. 163, 170), to which, under the above better rule, a successor judge must limit himself in deciding a motion for a new trial, based on insufficiency of the evidence. Plainly, in both such situations it is of no importance that the successor has not seen or heard the witnesses, which factor, as we have seen, is the reason for denying the successor power to decide the usual case in the first instance on the record made by his predecessor. Manifestly, the rule applicable to new trials should be held applicable here.

Rule 63 of the Federal Rules of Civil Procedure does not indicate a different result. This rule provides:

> "If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the

> court in which the action was tried may perform those duties, but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

From this it might be urged that where the deceased judge, as here, had not entered findings of fact, his successor could not in his discretion proceed without granting a new trial.

But this rule must be read in connection with Rule 52, which requires courts to make findings of fact and conclusions of law "in all actions tried upon the facts without a jury." It must also be read in connection with Rule 81, which makes the rules applicable in bankruptcy proceedings only insofar as made to apply thereto by rules of the Supreme Court, and with Article 37 of the Supreme Court's General Orders in Bankruptcy, which requires that in bankruptcy proceedings the rules "in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be." It has been held that the provisions with respect to findings of fact do not apply to proceedings under the Bankruptcy Act where the court is merely reviewing the Commission's findings to ascertain if they are supported by substantial evidence, such as the present. *In re Chicago, M. St. P. & P. R. Co.* (C.C.A. 7), 138 F.(2d) 433, 435; certiorari denied, 321 U.S. 770. This is because in such proceedings the court does not try the facts. Inasmuch as findings of fact by the court are not contemplated in proceedings of this sort, any limitations imposed by Rule 63, contingent upon whether death of the presiding judge occurred before or after he had made findings of fact, are inoperative.

It is significant also that in numerous special proceedings such as those in surrogate courts and orphans' courts the states have permitted a successor judge greater power than in the usual case, allowing him to decide a case in the first instance on the record made before his deceased predecessor without granting a new trial. *Matter of Winslow,* 12 Misc. 254, 34 N.Y. Supp. 637; *Matter of Goldthwaite,* 125 Misc. 265, 211 N.Y. Supp. 463; *Re Nolan,* 71 N.J. Eq. 207, 63 A. 618.

A more flexible rule than that applicable to the usual judicial proceedings has also been applied to administrative proceedings. Thus, it is well settled that in the case of administrative agencies a change of personnel during the course of a hearing, so that the same officer who takes the testimony does not prepare the decision, does not invalidate the proceedings. *Eastland Co. v. Federal Communications Commission* (App. D.C.), 92 F.(2d) 467, 470, certiorari denied, 302 U.S. 735; *Twin City Milk Producers Assn. v. McNutt* (C.C.A. 8), 122 F.(2d) 564, 568-569. In railroad reorganization proceedings where the administrative body and the courts must work in unison, it is essential that the flexible rule applicable to administrative agencies should be held also to apply to courts in reviewing the action of the administrative body. When it is recalled that railroad reorganization proceedings are often shunted back and forth between the Commission and the court, it is obvious that failure to apply this same rule to the judicial phase of the proceedings will lead to even greater confusion and delay than already characterizes the railroad reorganization scene. A procedure increasing such delays would clearly be opposed to the important Congressional motive in enacting section 77 of the Bankruptcy Act, to

alleviate the delay and expense incident to railroad receiverships. *Continental Bank v. Rock Island Railway, supra,* 685.

In addition, it is evident that under the particular circumstances of the present case petitioner was not injured by Judge Moore's refusal to grant a new trial. The Circuit Court properly observed (R. 5569):

> "There was considerable oral testimony before Judge Davis, but even more documentary. Such matters as bore upon credibility arose principally from claimed differences between oral testimony and prior written statements of a witness. Such differences speak from their face and little aid in judging credibility is gained by viewing the witness."

Furthermore, for the reasons indicated in Point I, *supra,* pgs. 34-35, the testimony introduced in the District Court by Meyer was entirely improper or immaterial. Moreover, Petitioner was not injured by the denial of a new trial, because Judge Moore's order taking the case as submitted on the record made before the Commission and Judge Davis, contained a provision that the Court would entertain any motion of any party for the taking of additional testimony or otherwise pertaining to the completion of the record (R. 5182). Yet Petitioner never filed any such motion to take additional testimony.

It is evident from the foregoing that Petitioner's present contention is so lacking in substance as to justify the conclusion that an important federal question warranting decision by this Court is not presented.

CONCLUSION

It is respectfully submitted that the petition for certiorari should be denied except as to Petitioner's fifth question.

Dated: San Francisco, Calif., February 15, 1947.

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the attached brief by Southern Pacific Company in opposition to petition for writ of certiorari upon all of the counsel of record by depositing same in the United States mails in San Francisco, California, with proper postage duly prepaid, this 15th day of February, 1947.

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(APPENDIX FOLLOWS)

Appendix

The pertinent provisions of Section 77 of the Bankruptcy Act (11 U.S.C. Sec. 205) are as follows:

"(c) After approving the petition:

* * * * * * *

"(7) The judge shall promptly determine and fix a reasonable time within which the claims of creditors may be filed or evidenced and after which no claim not so filed or evidenced may participate except on order for cause shown, the manner in which such claims may be filed or evidenced and allowed, and for the purposes of the plan and its acceptance, after notice and hearing, the division of creditors and stockholders into classes according to the nature of their respective claims and interests.

* * * * * * *

"(9) The Judge shall direct the trustee or trustees, and may request the Commission through such of its agencies as it may designate, to report to him any facts pertaining to irregularities, fraud, misconduct, or mismanagement, as a consequence of which the debtor may have a cause of action arising therefrom against any person or corporation.

* * * * * * *

"(d) The debtor, after a petition is filed as provided in subsection (a) of this section, shall file a plan of reorganization within six months of the entry of the order by the judge approving the petition as properly filed, * * *. After the filing of such a plan, the Commission, unless such plan shall be considered by it to be prima

facie impracticable, shall, after due notice to all stockholders and creditors given in such manner as it shall determine, hold public hearings, at which opportunity shall be given to any interested party to be heard, and following which the Commission shall render a report and order in which it shall approve a plan, which may be different from any which has been proposed, that will in its opinion meet with the requirements of subsections (b) and (e) of this section, and will be compatible with the public interest; or it shall render a report and order in which it shall refuse to approve any plan. In such report the Commission shall state fully the reasons for its conclusions.

* * * * * * *

"(e) Upon the certification of a plan by the Commission to the Court, the Court shall give due notice to all parties in interest of the time within which such parties may file with the Court their objection to such plan, and such parties shall file, within such time as may be fixed in said notice, detailed and specific objections in writing to the plan and their claims for equitable treatment. The judge shall, after notice in such manner as he may determine to the debtor, its trustee or trustees, stockholders, creditors, and the Commission, hear all parties in interest in support of, and in opposition to, such objections to the plan and such claims for equitable treatment. After such hearing, and without any hearing if no objections are filed, the judge shall approve the plan if satisfied that: (1) It complies with the provisions of subsection (b) of this section, is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders,

does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders; * * *

"If the judge shall not approve the plan, he shall file an opinion, stating his conclusions and the reason therefor, and he shall enter an order in which he may either dismiss the proceedings, or in his discretion and on motion of any party in interest refer the proceedings back to the Commission for further action, in which event he shall transmit to the Commission a copy of any evidence received. * * * If the judge shall approve the plan he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge; *Provided,* That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their

equity, if any, * * * *Provided further,* That submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors have no value, or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests. * * *

"If it shall be necessary to determine the value of any property for any purpose under this section, the Commission shall determine such value and certify the same to the Court in its report on the plan. The value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property, past, present, and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property, and the actual investment therein, as may be required under the law of the land, in light of its earning power and all other relevant facts."